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THE MALAYSIAN EXPERIENCE WITH ADR, WITH PARTICULAR REFERENCE TO THE RESOLUTION OF LABOUR DISPUTES

by

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1. Introduction

The need for an effective and expedient method of settling labour disputes, particularly collective disputes involving employers and trade unions, preoccupied the British Colonial Administration in Malaya in the early 1940's. Strikes, frequent and involving large numbers of workers were hampering the economic development of the Colony and adversely affecting the economic interests of colonial entrepreneurs. Added to this was the threat posed to Britain's political hegemony as history has recorded that these early labour up-risings were fanned by Communist ideology.[1] The concept of voluntary arbitration was introduced in 1940 when an Industrial Court was established under the Industrial Court Enactment 1940 (Federated Malay States). However, due to the outbreak of war, the Enactment of 1940 was never implemented. Subsequently, this early piece of legislation was replaced by the Industrial Courts Ordinance 1948, and the Trade Disputes Ordinance 1949.

However, voluntary arbitration as a method of settling labour disputes did not work in Malaysia. From 1948 to about 1963, only six disputes were referred to the Industrial Court, and in its twenty-year span from 1948 to 1967, the Industrial Court only made 18 awards. Some reasons offered for this failure include the apathy on the

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[1] Gamba, C., *The Origins of Trade Unionism in Malaya*, (1962) Eastern Universities Press, Ltd., S'pore.

part of employers and the preference of parties to disputes for the direct action of strikes, which have been known to yield the desired results.[2]

As the newly-independent Malaysian state found itself beset by strikes in most of its essential services, the catalyst for change came in the form of a political crisis – Indonesia's confrontation with Malaysia which resulted in the need to maintain uninterrupted essential services and general discipline in the labour force. The government declared an Emergency during which the Essential (Arbitration in the Essential Services) Regulations 1965 was passed which introduced the system of compulsory arbitration of trade disputes in Malaysia. This system remains in force until today.

2. The Statutory Scheme under the Industrial Relations Act 1967 for the Prevention and Settlement of Disputes

The Industrial Relations Act 1967[3] ["IRA"] provides for three main methods of dealing with trade disputes - conciliation, fact-finding (inquiry) and finally arbitration.[4] When a trade dispute[5] exists or is apprehended, an employer or trade union of workmen who are parties to the dispute may report the same to the Director General of Industrial Relations (DGIR).[6] However, the DGIR is empowered, whether or not a trade dispute has been reported to him, to take such steps as may be necessary or expedient for promoting a settlement of the trade dispute if he deems it necessary in the public interest to do so.[7] Among the steps which the DGIR might take for the settlement of trade disputes is to have the dispute referred to any machinery which already exists by virtue of agreement between the parties.[8] Only where the DGIR is

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[2] M. Ali Raza, "Legislative and Public Policy Developments in Malaysia's Industrial Relations", The Journal of Developing Areas, Vol. 3 (April 1969), pp 355, 356.
[3] Act 177.
[4] Ayadurai, D., *Industrial Relations in Malaysia*, (1998) MLJ, p. 81.
[5] "trade dispute" is defined as any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen – IRA, s. 2.
[6] Industrial Relations Act, 1967, s. 18(1).
[7] *ibid*, s. 18(3).
[8] *ibid*, s. 18(4).

satisfied that there is no likelihood of the trade dispute being settled that he must notify the Minister.[9]

Under "conciliation", the disputed parties have to attend a conference to be presided over by the DGIR or such other person as he may appoint.[10] The Minister is empowered to enter into conciliation proceedings "at any time, if he considers it necessary or expedient..."[11] Thus, the Minister is not dependant upon the DGIR's reporting procedure.

The IRA also empowers the Minister to appoint a Committee of Investigation or a Board of Inquiry and may refer to the Committee or Board any matter connected with or relevant to the dispute.[12] The Committee is empowered to "investigate the causes and circumstances" of any trade dispute or matter referred to it.[13] A Board on the other hand is empowered with the discretion to inquire into any matter referred to it either in public or in private, and report thereon to the Minister.[14] Any report of the Board has to be laid as soon as may be before the *Dewan Rakyat*,[15] (Lower House of Parliament) and the Minister may publish or cause to be published any information or conclusion arrived at by the Board as a result of or in the course of its inquiry.[16]

If a trade dispute is not otherwise resolved, the Minister is empowered to refer the dispute to the Industrial Court on the joint request in writing of a trade union of workmen and the employer who are parties to the dispute.[17] However, the Minister "may of his own motion" refer any trade dispute to the court if he is satisfied that it is expedient to do so.[18] Thus, the arbitration process may be initiated by the Minister without having to await notification from the DGIR that he has failed to cause the dispute to be settled, thus bringing the conciliation proceedings to a pre-mature end. Statute imposes no duty upon the disputing parties to enter into conciliation, and

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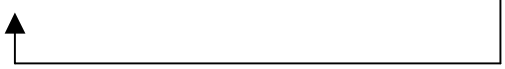
[9] *ibid*, 18(5).
[10] *ibid*, S. 19(2).
[11] *ibid*, s. 19A.
[12] IRA, s. 34.
[13] *ibid*, s. 35(1).
[14] *ibid*, s. 37(1).
[15] *ibid*., s. 37(3).
[16] *ibid.*, s. 37(4).
[17] IRA, s. 26(1).
[18] *ibid*., s. 26(2).

indeed conciliation is not a necessary first step prior to arbitration. Although the Act recognises industry arrangements for the settlement of trade disputes, the Minister has the discretion to override those arrangements if in his opinion it is unlikely that the dispute would be expeditiously settled through those arrangements.[19]

(a) Employer/ Trade Union → DGIR → Minister → Industrial Court

Ordinary flow of dispute-settlement process.

(b) Employer/ Trade Union → Minister → Industrial Court



Where the Minister may intervene, either to bring conciliation to an end or to have the dispute referred straight to the Industrial Court, without undergoing the conciliation process.

Apart from the settlement of trade disputes, another important dispute covered by the IRA relates to unfair dismissals, which, in Malaysia is governed by the concept of dismissal without just cause or excuse under section 20(1) of the IRA. When an employee, irrespective of whether he is a member of a trade union or otherwise, considers that he has been dismissed without just cause or excuse, he is entitled to make a representation in writing to the DGIR. Upon receipt of the representation, the DGIR must "take such steps as he may consider necessary or expedient" in order to settle the dispute as expeditiously as possible. Where the DGIR is satisfied that there is no likelihood of the representation being settled, he must notify the Minister. The Minister is given the discretion whether or not to have the dispute referred to the Industrial Court:

[19] *ibid*, s. 26(3).

(c) Dismissal → DGIR → Minister ⇢ Industrial Court.

(broken line denotes that Minister has discretion whether or not to refer dispute to court, and so, where dispute is not referred, it is "settled" at the Ministerial level)..

In Malaysia, conciliation is undertaken principally by government servants, that is, officers of the Industrial Relations Department of the Ministry of Human Resource. There are no autonomous bodies authorised by law to undertake conciliation services. At the time the Industrial Relations laws were drafted, Malaysia was still very much a newly-emergent nation with industrialisation in its early stages. The task of conciliation was given to government servants as "in most newly emergent nations of Asia, government servants continue to enjoy the prestige accorded to them during the colonial era."[20] Hence, it was felt that these persons were suitable as they could command the respect and confidence of the parties concerned.

Statistics from the Ministry of Human Resource seem to show that conciliation has been a success and a primary contributor to the settlement of labour disputes:

[20] Chelvasingam – MacIntyre, "Industrial Arbitration and Government's role in the field of Industrial Relations" [1971] 2 MLJ xlv.

Table I

Settlement of industrial/trade disputes

	1998	1999
Disputes carried forward	268	329
Disputes reported	442	496
Total	710	825
Settled	381	374
Mode of Settlement		
Conciliation	277	352
Referred to Industrial Court	71	22
Not referred	33	0
Total	381	374

Source: Annual Report, Ministry of Human Resource

Table II

Settlement of Dismissal Cases

	1998	1999
Disputes carried forward	2,123	4,275
Disputes reported	8,819	5,639
Total	10,942	9,644
Settled	6,667	5,133
Mode of Settlement		
Conciliation	5,003	3,346
Referred to Industrial Court	886	1,419
Not referred	778	368
Total	6,667	5,133

Source: Annual Report, Ministry of Human Resource

The statistics show that conciliation has been a success where collective labour disputes are concerned (Table i), where settlement of disputes through conciliation is

at 73% in 1998 and 94% in 1999. However, conciliation has not been as successful in the settlement of disputes pertaining to dismissal (Table ii). The failure of conciliation as a method of settlement here places the burden of settlement upon the Industrial Court. As Table (iii) shows, of the total number of cases arbitrated by the Industrial Court in a year, a large percentage comprise cases pertaining to termination, ie, in 1994, 81%; in 1995, 80%; in 1996, 72.8%; in 1997, 74.5% and in 1998, 72%.

Table III

Malaysia: Type of Cases Arbitrated by the Industrial Court, 1994-1998

Type of Cases	1994	1995	1996	1997	1998
Termination Cases					
Constructive	15	26	19	34	58
Misconduct	439	410	366	407	403
Retrenchment	9	4	50	14	17
Non-Termination Cases					
Non-Compliance of Award	15	41	67	60	69
Non-Compliance of Collective Agreement	12	14	16	30	42
Interpretation of Award/Collective Agreement	10	12	10	5	28
Variation of Award/Collective Agreement	7	3	1	2	12
Amendments to Collective Agreement (By Court	-	-	-	-	-
Order)	48	30	57	49	26
Collective Agreement (Terms and Conditions)	14	9	10	9	5
Questions of Law	-	-	1	1	4
Victimisation					
Total	**569**	**549**	**597**	**611**	**664**

Source: Industrial Court, Ministry of Human Resources

The relative success of conciliation in cases of collective labour disputes as opposed to individual disputes can be explained from the perspective of the way in which industrial adjudication operates in Malaysia, in particular the exercise of judicial review by the civil courts over inferior courts or tribunals such as the Industrial Court.

3. Powers of the Industrial Court, and the Effect of Judicial Review

As in other specialist tribunals established by statute to resolve particular disputes, the Malaysian Industrial Court is imbued with broad powers and jurisdiction, not confined in its operation by technicalities or legal form. Among its more important provisions are the following:

> (3) The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under section 20(3).
>
> (4) In making its award in respect of a trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.
>
> (5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.
>
> (6) In making its sward, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

There is no right of appeal from the decision of the Industrial Court to a higher court, and there is no special appellate court created for the settlement of labour disputes. Instead, an award decision or order of the court shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

The Industrial Court is not the only decision-maker in cases of labour disputes, particularly collective disputes. Broad discretionary powers are also conferred upon members of the Executive, such as the Minister and the Director-General of Industrial Relations to make “final decisions”, for example in cases of trade union recognition disputes. Statutory conferment of wide discretionary powers coupled with the

presence of ouster or privative clauses has led to the healthy growth of administrative law in the field of Malaysian industrial relations. However, the application of principles of administrative law by the civil courts in their exercise of judicial review has not been consistent. In collective labour disputes, where decisions have been made by members of the executive, for example to award recognition to a particular trade union or to deny representation rights to a class of workers, the civil courts have been slow to interfere with the exercise of executive powers and adopts a broad almost expansive approach in order to give effect to the actions of the executive.[21] In the case of dismissal without just cause or excuse, the civil courts appear to adopt the stance that such disputes, in order to be better adjudicated in the interest of justice to the affected party, ought to be referred to the Industrial court.[22] If the Minister fails to refer such disputes to the Industrial Court, he must have good reasons for not doing so and must clearly explain those reasons, otherwise, it will be presumed that he had no good reasons for the failure to make the reference. Hence a good deal of disputes on dismissals end up at the Industrial Court while most collective disputes would be settled, either by the parties concerned or by executive decision.

4. The Future of ADR as a dispute-solving mechanism for labour disputes in Malaysia

Although official statistics look impressive, many labour lawyers in Malaysia are of the opinion that conciliation as a method of dispute-resolution for labour disputes does not work as well as it should. Conciliation is carried out by government servants with no formal training in ADR or even exposure to it, but who are expected to learn on the job. Secondly, while disputes continue to increase, there is a limitation on the number of officers available to undertake conciliation, as it is not easy to increase the number of officers due to government budgetary constraints. The above problems coupled with increasing legalism due to judicial review has prompted moves to alter the fundamental character of the Industrial Court. In a move to "streamline quasi-judicial and purely judicial issues", future Industrial Court Chairmen will most

[21] *Metal Industry Employees Union v Registrar of Trade Unions* [1976] 1 MLJ 220.
[22] *Hong Leogn Equipment Sdn Bhd v Liew Fook Chuean* [1996] 1 MLJ 481; *R Rama Chandran v The Industrial Court* [1997] 1 MLJ 145.

likely consist of officers from the Attorney-General's Chambers. Currently, the Industrial Court is comprised of a panel of persons representing employers and a panel of persons representing workmen, all of whom are appointed by the Minister. Prior to such appointment, the Minister normally consults organisations representing employers and workmen.

It has been acknowledged that this will most likely "render future industrial disputes" more technical.[23] The Malaysian Trades Union Congress, in opposing the move, expressed its concern that this will drastically change the character of the Industrial Court: "The Industrial Court normally makes decisions by placing more importance on employers and employees' interest rather than on the technicalities of the law. Workers will lose out if the change is enforced-disputes can then only be settled by a protracted legal battle."[24]

Thus, while ADR has been seen to be gaining momentum as an effective method of dispute settlement in other fields, such as consumer cases, it is greatly under threat in the field of labour disputes.

[23] Minister in the Prime Minister's Department responsible for law – quoted in "The Sun", 23 July 2001.
[24] MTUC Secretary General, quoted in "The Sun", 23 July 2001.